

Joseph R. Manning, Jr., Esq. (State Bar No. 223381)
Michael J. Manning, Esq. (State Bar No. 286879)
Caitlin J. Scott, Esq. (State Bar No. 310619)
Tristan P. Jankowski, Esq. (State Bar No. 290301)
MANNING LAW, APC
4667 MacArthur Blvd., Suite 150
Newport Beach, CA 92660
Office: (949) 200-8755
Fax: (866) 843-8308
ADAPracticeGroup@manninglawoffice.com

Attorneys for Plaintiff SEAN GORECKI

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

SEAN GORECKI, an individual,

Plaintiff,

v.

PINKBERRY, INC., a California

corporation; and DOES 1-10,

inclusive,

Defendant.

**COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF:**

- 1. VIOLATIONS OF THE
AMERICANS WITH DISABILITIES
ACT OF 1990, 42 U.S.C. §12181 *et*
seq. [PINKBERRY.COM]**
- 2. VIOLATIONS OF THE UNRUH
CIVIL RIGHTS ACT, CALIFORNIA
CIVIL CODE § 51 *et seq.*
[PINKBERRY.COM]**

1 Plaintiff, SEAN GORECKI (“Plaintiff”), alleges the following upon
2 information and belief based upon personal knowledge:

3 **INTRODUCTION**

4 1. Plaintiff is a visually-impaired and legally blind person who requires
5 screen-reading software to read website content using his computer. Plaintiff uses
6 the terms “blind” or “visually-impaired” to refer to all people with visual
7 impairments who meet the legal definition of blindness in that they have a visual
8 acuity with correction of less than or equal to 20 x 200. Some blind people who
9 meet this definition have limited vision. Others have no vision.

10 2. Plaintiff brings this civil rights action against Defendant PINKBERRY,
11 INC. (“Defendant” or “Pinkberry”) for its failure to design, construct, maintain, and
12 operate its website to be fully accessible to and independently usable by Plaintiff and
13 other blind or visually-impaired people. Defendant’s denial of full and equal access
14 to its website, and therefore denial of its products and services offered thereby and in
15 conjunction with its physical locations, is a violation of Plaintiff’s rights under the
16 Americans with Disabilities Act (“ADA”) and California’s Unruh Civil Rights Act
17 (“UCRA”).

18 3. Because Defendant’s website, Pinkberry.com (the “website” or
19 “Defendant’s website”), is not equally accessible to blind and visually-impaired
20 consumers in violation of the ADA, Plaintiff seeks a permanent injunction to cause a
21 change in Defendant’s corporate policies, practices, and procedures so that
22 Defendant’s website will become and remain accessible to blind and visually-
23 impaired consumers.

24 **JURISDICTION AND VENUE**

25 4. This Court has subject-matter jurisdiction over this action pursuant to
26 28 U.S.C. § 1331 and 42 U.S.C. § 12181, as Plaintiff’s claims arise under Title III of
27 the ADA, 42 U.S.C. § 12181, *et seq.*, and 28 U.S.C. § 1332.

28 5. This court has supplemental jurisdiction over Plaintiff’s non-federal

1 claims pursuant to 28 U.S.C. § 1367, because Plaintiff's UCRA claims are so related
2 to Plaintiff's federal ADA claims, they form part of the same case or controversy
3 under Article III of the United States Constitution.

4 6. This Court has personal jurisdiction over Defendant because it conducts
5 and continues to conduct a substantial and significant amount of business in the
6 State of California, County of Los Angeles, and because Defendant's offending
7 website is available across California.

8 7. Venue is proper in the Central District of California pursuant to 28
9 U.S.C. §1391 because Plaintiff resides in this District, Defendant conducts and
10 continues to conduct a substantial and significant amount of business in this District,
11 Defendant is subject to personal jurisdiction in this District, and a substantial portion
12 of the conduct complained of herein occurred in this District.

13 **PARTIES**

14 8. Plaintiff, at all times relevant and as alleged herein, is a resident of
15 California, County of Los Angeles. Plaintiff is a blind, visually-impaired
16 handicapped person, and a member of a protected class of individuals under the
17 ADA, pursuant to 42 U.S.C. § 12102(1)-(2), and the regulations implementing the
18 ADA set forth at 28 CFR §§ 36.101 *et seq.*

19 9. Plaintiff is informed and believes, and thereon alleges Defendant is a
20 corporation, incorporated in California and has its principal place of business in
21 Scottsdale, Arizona. Defendant is registered to do business in the State of California
22 and has been doing business in the State of California, including the Central District
23 of California. Defendant operates many of its Pinkberry stores ("Pinkberry stores"
24 or "Defendant's stores" hereinafter) in the Central District of California. These
25 Pinkberry stores constitute places of public accommodation. Defendant's stores
26 provide to the public important goods and services. Defendant's website provides
27 consumers with access to an array of goods and services including store locators,
28 product descriptions, nutritional information, product and gift card sales, online

1 orders for pick-up, access to the Pinkcard loyalty club, and many other benefits
2 related to these goods and services.

3 10. Defendant's stores are public accommodations within the definition of
4 Title III of the ADA, 42 U.S.C. § 12181(7). Pinkberry.com is a service, privilege, or
5 advantage of Defendant's stores.

6 11. Defendant is subject to personal jurisdiction in this District. Defendant
7 has been and is committing the acts or omissions alleged herein in the Central
8 District of California that caused injury, and violated rights prescribed by the ADA
9 and UCRA, to Plaintiff and to other blind and other visually impaired-consumers. A
10 substantial part of the acts and omissions giving rise to Plaintiff's claims occurred in
11 the Central District of California. Specifically, on several separate occasions,
12 Plaintiff has been denied the full use and enjoyment of the facilities, goods, and
13 services of Defendant's website in Los Angeles County. The access barriers Plaintiff
14 encountered on Defendant's website have caused a denial of Plaintiff's full and
15 equal access multiple times in the past, and now deter Plaintiff on a regular basis
16 from accessing Defendant's website. Similarly, the access barriers Plaintiff
17 encountered on Defendant's website have impeded Plaintiff's full and equal
18 enjoyment of goods and services offered at Defendant's brick-and mortar stores.

19 **THE AMERICANS WITH DISABILITIES ACT AND THE INTERNET**

20 12. The Internet has become a significant source of information, a portal,
21 and a tool for conducting business, doing everyday activities such as shopping,
22 learning, banking, researching, as well as many other activities for sighted, blind and
23 visually-impaired persons alike.

24 13. In today's tech-savvy world, blind and visually-impaired people have
25 the ability to access websites using keyboards in conjunction with screen access
26 software that vocalizes the visual information found on a computer screen. This
27 technology is known as screen-reading software. Screen-reading software is
28 currently the only method a blind or visually-impaired person may independently

1 access the internet. Unless websites are designed to be read by screen-reading
2 software, blind and visually-impaired persons are unable to fully access websites,
3 and the information, products, and services contained thereon.

4 14. Blind and visually-impaired users of Windows operating system-
5 enabled computers and devices have several screen reading software programs
6 available to them. Some of these programs are available for purchase and other
7 programs are available without the user having to purchase the program separately.
8 Job Access With Speech, otherwise known as "JAWS," is currently the most
9 popular, separately purchased and downloaded screen-reading software program
10 available for a Windows computer.

11 15. For screen-reading software to function, the information on a website
12 must be capable of being rendered into text. If the website content is not capable of
13 being rendered into text, the blind or visually-impaired user is unable to access the
14 same content available to sighted users.

15 16. The international website standards organization, the World Wide Web
16 Consortium, known throughout the world as W3C, has published version 2.0 A and
17 AA of the Web Content Accessibility Guidelines ("WCAG 2.0" hereinafter).
18 WCAG 2.0 are well-established guidelines for making websites accessible to blind
19 and visually-impaired people. These guidelines are followed by most large business
20 entities who want to ensure their websites are accessible to screen-reader users.

21 17. Non-compliant websites pose common access barriers to blind and
22 visually-impaired persons. Common barriers encountered by blind and visually
23 impaired persons include, but are not limited to, the following:

- 24 a. A text equivalent for every non-text element is not provided;
- 25 b. Title frames with text are not provided for identification and
26 navigation;
- 27 c. Equivalent text is not provided when using scripts;
- 28 d. Forms with the same information and functionality as for sighted

persons are not provided;

- e. Information about the meaning and structure of content is not conveyed by more than the visual presentation of content;
- f. Text cannot be resized without assistive technology up to 200 percent without loss of content or functionality;
- g. If the content enforces a time limit, the user is not able to extend, adjust or disable it;
- h. Web pages do not have titles that describe the topic or purpose;
- i. The purpose of each link cannot be determined from the link text alone or from the link text and its programmatically determined link context;
- j. One or more keyboard operable user interface lacks a mode of operation where the keyboard focus indicator is discernible;
- k. The default human language of each web page cannot be programmatically determined;
- l. When a component receives focus, it may initiate a change in context;
- m. Changing the setting of a user interface component may automatically cause a change of context where the user has not been advised before using the component;
- n. Labels or instructions are not provided when content requires user input;
- o. In content which is implemented by using markup languages, elements do not have complete start and end tags, elements are not nested according to their specifications, elements may contain duplicate attributes and/or any IDs are not unique;
- p. Inaccessible Portable Document Format (PDFs); and,
- q. The name and role of all User Interface elements cannot be programmatically determined; items that can be set by the user cannot

1 be programmatically set; and/or notification of changes to these items
2 is not available to user agents, including assistive technology.

3 **FACTUAL BACKGROUND**

4 18. Defendant offers the commercial website, Pinkberry.com, to the public.
5 The website offers features which should allow all consumers to access the goods
6 and services which Defendant offers in connection with its physical locations. The
7 goods and services offered by Defendant include, but are not limited to the
8 following, which allow consumers to: find information about the available menu
9 items and nutritional values Defendant offers to consumers for purchase; locate
10 Pinkberry stores which offer dine-in and take-out options; purchase Pinkberry gift
11 cards; catering options and other services.

12 19. Based on information and belief, it is Defendant's policy and practice to
13 deny Plaintiff, along with other blind or visually-impaired users, access to
14 Defendant's website, and to therefore specifically deny the goods and services that
15 are offered and integrated with Defendant's stores. Due to Defendant's failure and
16 refusal to remove access barriers to its website, Plaintiff and visually-impaired
17 persons have been and are still being denied equal access to Pinkberry stores and the
18 numerous goods, services, and benefits offered to the public through Pinkberry.com.

19 **Defendant's Barriers on Pinkberry.com Deny Plaintiff Access**

20 20. Plaintiff is a visually-impaired and legally blind person, who cannot use
21 a computer without the assistance of screen-reading software. However, Plaintiff is
22 a proficient user of the JAWS screen-reader and uses it to access the internet.
23 Plaintiff has visited Pinkberry.com on several separate occasions using the JAWS
24 screen-reader.

25 21. During Plaintiff's multiple visits to Defendant's website, Plaintiff
26 encountered multiple access barriers which denied Plaintiff full and equal access to
27 the facilities, goods and services offered to the public and made available to the
28 public on Defendant's website. Due to the widespread access barriers Plaintiff

1 encountered on Defendant's website, Plaintiff has been deterred, on a regular basis,
2 from accessing Defendant's website. Similarly, the access barriers Plaintiff
3 encountered on Defendant's website have deterred Plaintiff from visiting
4 Defendant's brick-and-mortar stores.

5 22. While attempting to navigate Pinkberry.com, Plaintiff encountered
6 multiple accessibility barriers for blind or visually-impaired people that include, but
7 are not limited to, the following:

- 8 a. Lack of Alternative Text ("alt-text"), or a text equivalent. Alt-text is
9 invisible code embedded beneath a graphical image on a website.
10 Web accessibility requires that alt-text be coded with each picture so
11 that screen-reading software can speak the alt-text where a sighted
12 user sees pictures. Alt-text does not change the visual presentation,
13 but instead a text box shows when the cursor moves over the picture.
14 The lack of alt-text on these graphics prevents screen readers from
15 accurately vocalizing a description of the graphics. As a result,
16 visually-impaired Pinkberry customers are unable to determine what
17 is on the website, browse, look for store locations, explore
18 Defendant's programs and specials, or make purchases;
- 19 b. Empty Links That Contain No Text causing the function or purpose of
20 the link to not be presented to the user. This can introduce confusion
21 for keyboard and screen-reader users;
- 22 c. Redundant Links where adjacent links go to the same URL address
23 which results in additional navigation and repetition for keyboard and
24 screen-reader users; and
- 25 d. Linked Images Missing Alt-text, which causes problems if an image
26 within a link contains no text and that image does not provide alt-text.
27 A screen reader then has no content to present the user as to the
28 function of the link, including information contained in PDFs.

23. Recently in 2016, Plaintiff attempted to do business with Defendant on Pinkberry.com and Plaintiff encountered barriers to access on Pinkberry.com.

24. Despite past and recent attempts to do business with Defendant on its website, the numerous access barriers contained on the website and encountered by Plaintiff, have denied Plaintiff full and equal access to Defendant's website. Plaintiff, as a result of the barriers on the Pinkberry website, continues to be deterred on a regular basis from accessing Defendant's website. Likewise, based on the numerous access barriers Plaintiff has been impeded from the independent, full and equal enjoyment of goods and services offered in Defendant's stores and from making purchases at such physical locations.

Defendant Must Remove Barriers To Its Website

25. Due to the inaccessibility of Pinkberry.com, blind and visually-impaired customers such as Plaintiff, who need screen-readers, cannot fully and equally use or enjoy the facilities, goods, and services Defendant offers to the public on its website. The access barriers Plaintiff encountered on Defendant's website have caused a denial of Plaintiff's full and equal access multiple times in the past, and now deter Plaintiff on a regular basis from accessing Defendant's website. In addition, the access barriers Plaintiff encountered on Defendant's website have deterred Plaintiff from visiting Pinkberry store locations.

26. If Pinkberry.com was independently, fully and equally accessible to all, Plaintiff could independently navigate these websites and complete a desired transaction as sighted individuals do.

27. Through his many attempts to use Defendant's website, Plaintiff has actual knowledge of the access barriers that make these services inaccessible and independently unusable by blind and visually-impaired people.

28. Because compliance with the WCAG 2.0 Guidelines would provide Plaintiff, legally-blind and other visually-impaired consumers with equal access to Pinkberry.com, Plaintiff alleges that Defendant has engaged in intentional acts of

1 discrimination, including but not limited to the following policies or practices:

- 2 a. Construction and maintenance of a website that is inaccessible to
- 3 legally-blind and visually-impaired individuals, including Plaintiff;
- 4 b. Failure to construct and maintain a website that is sufficiently intuitive
- 5 so as to be equally accessible to visually-impaired individuals,
- 6 including Plaintiff; and,
- 7 c. Failure to take actions to correct these access barriers in the face of
- 8 substantial harm and discrimination to blind and visually-impaired
- 9 consumers, such as Plaintiff, as a member of a protected class.

10 29. Defendant therefore uses standards, criteria or methods of

11 administration that have the effect of discriminating or perpetuating the

12 discrimination of others, as alleged herein.

13 30. The ADA expressly contemplates the type of injunctive relief that

14 Plaintiff seeks in this action. In relevant part, the ADA requires:

15

16 “In the case of violations of . . . this title, injunctive relief shall include an

17 order to alter facilities to make such facilities readily accessible to and usable

18 by individuals with disabilities....Where appropriate, injunctive relief shall

also include requiring the . . . modification of a policy. . .”

19 (42 U.S.C. § 12188(a)(2).)

20 31. Because Defendant’s website has never been fully, independently or

21 equally accessible, and because Defendant lacks a corporate policy that is reasonably

22 calculated to cause its website to become and remain accessible, Plaintiff invokes the

23 provisions of 42 U.S.C. § 12188(a)(2), and seeks a permanent injunction requiring

24 Defendant to retain a qualified consultant acceptable to Plaintiff (“Agreed Upon

25 Consultant”) to assist Defendant to comply with WCAG 2.0 guidelines for its

26 website. Plaintiff seeks that this permanent injunction require Defendant to

27 cooperate with the Agreed Upon Consultant to:

- 28 a. Train Defendant’s employees and agents who develop the

Pinkberry.com website on accessibility compliance under the WCAG 2.0 guidelines;

- b. Regularly check the accessibility of Defendant's website under the WCAG 2.0 guidelines;
- c. Regularly test user accessibility by blind or vision-impaired persons to ensure that Defendant's website complies under the WCAG 2.0 guidelines; and,
- d. Develop an accessibility policy that is clearly disclosed on its websites, with contact information for users to report accessibility-related problems.

32. If Pinkberry.com was accessible, Plaintiff and similarly situated blind and visually-impaired people could independently locate Defendant's stores, view menu items, customize menu items for purchase, shop for and otherwise research related products available via Defendant's website.

33. Although Defendant may currently have centralized policies regarding the maintenance and operation of its website, Defendant lacks a plan and policy reasonably calculated to make its websites fully and equally accessible to, and independently usable by, blind and other visually-impaired consumers.

34. Without injunctive relief, Plaintiff and other visually-impaired consumers will continue to be unable to independently use the Defendant's website in violation of their rights.

FIRST CAUSE OF ACTION

VIOLATIONS OF THE AMERICANS WITH DISABILITIES ACT OF 1990,

42 U.S.C. § 12181 et seq. [PINKBERRY.COM]

35. Plaintiff re-alleges and incorporates by reference all paragraphs alleged above and each and every other paragraph in this Complaint necessary or helpful to state this cause of action as though fully set forth herein.

36. Section 302(a) of Title III of the ADA, 42 U.S.C. § 12101 *et seq.*,

1 provides:

2 “No individual shall be discriminated against on the basis of disability in the
3 full and equal enjoyment of the goods, services, facilities, privileges,
4 advantages, or accommodations of any place of public accommodation by any
5 person who owns, leases (or leases to), or operates a place of public
6 accommodation.”

(42 U.S.C. § 12182(a).)

7 37. Defendant’s stores are public accommodations within the definition of
8 Title III of the ADA, 42 U.S.C. § 12181(7). Pinkberry.com is a service, privilege, or
9 advantage of Defendant’s stores. Pinkberry.com is a service that is integrated with
10 these locations.

11 38. Under Section 302(b)(1) of Title III of the ADA, it is unlawful
12 discrimination to deny individuals with disabilities the opportunity to participate in
13 or benefit from the goods, services, facilities, privileges, advantages, or
14 accommodations of an entity. (42 U.S.C. § 12182(b)(1)(A)(i).)

15 39. Under Section 302(b)(1) of Title III of the ADA, it is unlawful
16 discrimination to deny individuals with disabilities an opportunity to participate in or
17 benefit from the goods, services, facilities, privileges, advantages, or
18 accommodation, which is equal to the opportunities afforded to other individuals.
19 (42 U.S.C. § 12182(b)(1)(A)(ii).)

20 40. Under Section 302(b)(2) of Title III of the ADA, unlawful
21 discrimination also includes, among other things:

22 “[A] failure to make reasonable modifications in policies, practices, or
23 procedures, when such modifications are necessary to afford such goods,
24 services, facilities, privileges, advantages, or accommodations to individuals
25 with disabilities, unless the entity can demonstrate that making such
26 modifications would fundamentally alter the nature of such goods, services,
27 facilities, privileges, advantages or accommodations; and a failure to take such
28 steps as may be necessary to ensure that no individual with a disability is
excluded, denied services, segregated or otherwise treated differently than
other individuals because of the absence of auxiliary aids and services, unless
the entity can demonstrate that taking such steps would fundamentally alter
the nature of the good, service, facility, privilege, advantage, or

1 accommodation being offered or would result in an undue burden.”

2 (42 U.S.C. § 12182(b)(2)(A)(ii)-(iii).)

3 41. The acts alleged herein constitute violations of Title III of the ADA,
4 and the regulations promulgated thereunder. Plaintiff, who is a member of a
5 protected class of persons under the ADA, has a physical disability that substantially
6 limits the major life activity of sight within the meaning of 42 U.S.C. §§
7 12102(1)(A)-(2)(A). Furthermore, Plaintiff has been denied full and equal access to
8 Pinkberry.com, has not been provided services which are provided to other patrons
9 who are not disabled, and has been provided services that are inferior to the services
10 provided to non-disabled persons. Defendant has failed to take any prompt and
11 equitable steps to remedy its discriminatory conduct. These violations are ongoing.

12 42. Pursuant to 42 U.S.C. § 12188 and the remedies, procedures, and rights
13 set forth and incorporated therein, Plaintiff, requests relief as set forth below.

14 **SECOND CAUSE OF ACTION**

15 **VIOLATION OF THE UNRUH CIVIL RIGHTS ACT, CALIFORNIA CIVIL**

16 **CODE § 51 *et seq.* [PINKBERRY.COM]**

17 43. Plaintiff re-alleges and incorporates by reference all paragraphs alleged
18 above and each and every other paragraph in this Complaint necessary or helpful to
19 state this cause of action as though fully set forth herein.

20 44. California Civil Code § 51 *et seq.* guarantees equal access for people
21 with disabilities to the accommodations, advantages, facilities, privileges, and
22 services of all business establishments of any kind whatsoever. Defendant is
23 systematically violating the UCRA, Civil Code § 51 *et seq.*

24 45. Defendant's stores are "business establishments" within the meaning of
25 the Civil Code § 51 *et seq.* Defendant generates millions of dollars in revenue from
26 the sale of goods through its Pinkberry.com website. Defendant's website is a
27 service provided by Defendant that is inaccessible to patrons who are blind or
28 visually-impaired like Plaintiff. This inaccessibility denies blind and visually-

1 impaired patrons full and equal access to the facilities, goods, and services that
2 Defendant makes available to the non-disabled public. Defendant is violating the
3 UCRA, Civil Code § 51 *et seq.*, by denying visually-impaired customers the goods
4 and services provided on its website. These violations are ongoing.

5 46. Defendant's actions constitute intentional discrimination against
6 Plaintiff on the basis of a disability, in violation of the UCRA, Civil Code § 51 *et*
7 *seq.*, because Defendant has constructed a website that is inaccessible to Plaintiff,
8 Defendant maintains the website in an inaccessible form, and Defendant has failed to
9 take actions to correct these barriers.

10 47. Defendant is also violating the UCRA, Civil Code § 51 *et seq.* because
11 the conduct alleged herein violates various provisions of the ADA, 42 U.S.C. §
12 12101 *et seq.*, as set forth above. Section 51(f) of the Civil Code provides that a
13 violation of the right of any individual under the ADA also constitutes a violation of
14 the UCRA.

15 48. The actions of Defendant violate UCRA, Civil Code § 51 *et seq.*, and
16 Plaintiff is therefore entitled to injunctive relief remedying the discrimination.

17 49. Plaintiff is entitled to statutory minimum damages pursuant to Civil
18 Code § 52 for each and every offense.

19 50. Plaintiff is also entitled to reasonable attorneys' fees and costs.

20 **PRAYER**

21 **WHEREFORE, Plaintiff prays pray for judgment against Defendant, as**
22 **follows:**

23 1. A Declaratory Judgment that, at the commencement of this action,
24 Defendant was in violation of the specific requirements of Title III of the ADA 42
25 U.S.C. § 12181 *et seq.*, and the relevant implementing regulations of the ADA, for
26 Defendant's failure to take action that was reasonably calculated to ensure that its
27 websites are fully accessible to, and independently usable by, blind and visually-
28 impaired individuals;

2. A preliminary and permanent injunction enjoining Defendant from further violations of the ADA, 42 U.S.C. § 12181 *et seq.*, and/or the UCRA, Civil Code § 51 *et seq.* with respect to its website, Pinkberry.com;

3. A preliminary and permanent injunction requiring Defendant to take the steps necessary to make Pinkberry.com readily accessible to and usable by blind and visually-impaired individuals;

4. An award of statutory minimum damages of \$4,000 per violation pursuant to § 52(a) of the California Civil Code;

5. For attorneys' fees and expenses pursuant to all applicable laws including, without limitation, pursuant to 42 U.S.C. § 12188(a)(1), and California Civil Code § 52(a);

6. For pre-judgment interest to the extent permitted by law;

7. For costs of suit; and

8. For such other and further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby respectfully requests a trial by jury on all appropriate issues raised in this Complaint.

Dated: February 3, 2017

MANNING LAW, APC

By: /s/ Joseph R. Manning Jr., Esq. _____

Joseph R. Manning Jr., Esq.

Caitlin J. Scott, Esq.

Michael J. Manning, Esq.

Attorneys for Plaintiff